IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 2836 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAMSISNG MURLIDHAR YADAV

Versus

STATE OF GUJARAT

Appearance:

MR JAYANT P BHATT for Petitioner

Mr K G Sheth, APP for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 14/09/2000

ORAL JUDGEMENT

This is an application under section 482 of the Criminal Procedure Code, 1973 for quashing and setting aside the complaint filed by the original informant before the learned Judicial Magistrate First Class at

Gandhinagar taking cognizance of the offences against the petitioner punishable under sections 323, 325, 506, 341 and 114 of Indian Penal Code on 31.8.1998. The facts may be briefly stated as follows:

An offence was registered before the Adalaj Police Station, Gandhinagar being C.R. No.Part I-216/98 against 10 persons for offences punishable under sections 399 read with section 120(B) of I.P.C. It appears that the accused persons named in the FIR were arrested and police remand was also sought. It appears from the record that the accused persons were produced before the Judicial Magistrate First Class, Gandhinagar on 25.8.1998 and they were remanded to the police custody for two days and, therefore, they were again presented before the learned Judicial Magistrate on 27.8.1998. At that point of time, the learned Judicial Magistrate enquired about the ill-treatment, if any, extended by police towards those accused persons. As per page 21 of the petition, accused No. 1 to 5 and accused No.8 and 9, said that they had no complaint against the police. Accused no.6, Gafoorbhai M Rabari submitted that one police, who had put on white dress, who happened to be the D.S.P. had beaten the said accused as per the details mentioned at page 21. Accused no.7-Yasimkhan Sharifkhan also made some complaint but he did not mention the name of the present petitioner or any other person by name. Since the said accused no.6 had referred the D.S.P. being the person who had beaten him, the learned Magistrate considered the said staement recorded on 27.8.1998 as a complaint and thereafter, issued process for summons against the present petitioner being the D.S.P., Gandhinagar by order dated 31.8.1998.

2. Feeling aggrieved by the said order of the learned Magistrate, the petitioner had preferred this petition beore this Court. It has been mainly contended here that the learned Magistrate, while taking cognizance of the offence and while issuing orders for summons against the petitioner, omitted to record verification of accused no.6 on oath as per the requirement and order was directly passed below Exh.1.

3. Rule was issued and Mr K G Sheth, learned APP appears for the State. I have heard the learned Advocates for the parties and have perused the papers. The facts are undisputed. The accused persons were present before the court and their statements were recorded and again statements were recorded on 27.8.1998 and thereafter, the process was issued on 31.8.1998. These facts are undisputed. Learned Advocate for the

petitioner has argued at length that as per the requirement of law, it was necessary for the learned Magistrate to record verification on oath of the complainant and since this was not done, the order for issuing process is illegal. It is clear that the learned Magistrate has acted under Section 190 of the Criminal Procedure Code which empowers him to take cognizance of the offence on the strength of the complaint made to him as well as on the strength of any information received by him. There is no dispute about the same. So far as the complaint is concerned, definition of the complaint has been found in sub-clause (d) of section 2 of the Criminal Procedure Code, 1973. (for short, 'the Code') which says that a complaint means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Naturally, an oral complaint made to the learned Magistrate by a private individual could not be treated to be a police report and, therefore, it is an admitted position that this was a complaint before the learned Magistrate at the relevant point of time.

4. Section 200 of the Code says that a Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. Therefore, there are mandatory requirements before proceeding under Section 200 of the Code. The first requirement is that there must be examination of the complainant on oath and the second is that such examination is required to be signed by the complainant. In the present case, from the record it is very clear that the aforesaid oral statement made by the said complainant being accused no.6 was not on oath and thereafter, before issuing process, verification on oath has not been recorded by the learned Magistrate. Therefore, the learned Magistrate has passed order for issue of process against the present petitioner on the strength of the oral statement of accused no.6 without recording examination on oath of the said accused being complainant in the said matter.

5. On this aspect of the case, learned Advocate for the petitioner has relied upon a decision in the case of D L Reddy v. Narayana Reddy & Ors., reported in AIR 1976 SC 1672. The decision relates to the expression "taking cognizance of an offence" by the Magistrate and it has been laid down that the ways in which such cognizance can

be taken are set out in clauses (a) (b) and (c) of Section 190 (1) of the Code. In the present case, the learned Magistrate has taken cognizance under the aforesaid provisions of the Code and there cannot be any dispute about the same. Another decision can be found from the case of Associated Cement Co. v. Keshvanand, reported in AIR 1998 SC 596. Para 23 of the said decision is reproduced for ready reference as under:

> "Chapter XV of the new Code contains provisions for lodging complaints with Magaistrates. Section 200 as the starting provision of thata chapter enjoins on the Magistrate, who takes cognizance of an offence on a complaint to examine the complainant on oath. Such examination is mandatory as can be discerned from the words "shall examine on oath the complainant...." The Magistrate is further required to reduce the substance of such examination to writing and it "shall be signed by the complainant" Under section 203, the Magistrate is to dismiss the complaint if he is of opinion that there is no sufficient ground for proceeding after considering the said statement on oath. Such examination of the complainant on oath can be dispensed with only under two situations, one if the complaint was filed by a public servant, acting or purporting to act in the discharge of his official duties and the other when a Court has made the complaint. Except under the above understandable situations, the complainant has to make his physical presence for being examined by the Magistrate. Section 236 or Section 249 of the new Code cloths the Magistrate with jurisdiction to dismiss the complaint when the complainant is absent, which means hhis physical absence."

From the bare reading of section 200 of the Code and para 23 of the aforesaid judgment it is very clear that the Magistrate, who took cognizance of offence on a complaint had to examine the complainant on oath and that such examination is mandatory. It is also observed in the said decision that the Magistrate has further to reduce such examination to writing and it shall be signed by the complainant and the witnesses. The aforesaid decision also says that it is a mandatory requirement for the Magistrate to record verification on oath and obtain signature of the person making the statement. In the present case, the aforesaid mandatory requirements are not complied with and I am satisfied, therefore, that the

order of the learned Magistrate for issue of process against the petitioner passed on 31.8.1998 suffers from the aforesaid illegality and the aforesaid infirmity. Therefore, the said order cannot be sustained for any moment.

6. Learned APP, Mr K G Sheth has argued that the learned Magistrate has recorded oral statement and has taken cognizance on the basis of the said statement but he was unable to show any law that even when the cognizance has been taken on the basis of oral statement of the complainant, no verification or examination on oath of the complainant is required and even signature of the person making statement can also be omitted. In other words, learned APP was unable to support the aforesaid order of the learned Magistrate issuing process on 31.8.1998. Mr K G Sheth submits that even if the process is quashed, the complainant will be at liberty to go for fresh verification or examination on oath in accordance with the provisions contained in section 200 of the Code. Naturally, the parties will be at liberty to proceed according to law if and when permissible under the law. If any such action is taken by the contesting respondent, then naturally, the present petitioner will be at liberty to contest such matters in accordance with law.

7. With the aforesaid observation, I am of the view that this petition requires to be allowed and the order issuing process passed by the learned Magistrate is required to be quashed and set aside. In view of the aforesaid, rest of the points were not argued. The petitioner will be at liberty to deal with those points if and when required.

8. In the result, this petition is allowed. The order passed by the learned Magistrate, Gandhinagar dated 31.8.1998 directing the registration of complaint and for issuing process against the petitioner for the offences indicated in the order is ordered to be quashed and set aside.

Rule is made absolute to the aforesaid extent.

Learned APP requests that copy of this order may be sent to the concerned accused. The office is directed to forward the same accordingly.

14.9.2000 [D P Buch, J.]
msp